Date: December 18, 1997

Case No.: 95-INA-00456

In the Matter of:

TALENT INTERNATIONAL, INC.,
Employer

On Behalf Of:

YUNG-CHANG P. HUANG,
Alien

Appearance: James Tam, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 14, 1993, Talent International, Inc., the Employer, filed an application for alien employment certification to enable Yung-Chang Porthos Huang, the Alien, to fill the position of Import/Export Manager. The duties of the job were described as follows:

> Supervise the preparation of import/export documents, review incoming documents for accuracy and letter of credit terms. Coordinate with freight forwarders and schedule/assign shipments either for air freight or ocean transport. Must speak and write Chinese in order to confirm shipments ordered in Chinese language since major supplier and customers are in Taiwan.

The Employer required that applicants have two years of a college education, four years of experience in the job offered and the ability to speak and write Chinese fluently (AF 121).

The CO issued a Notice of Findings (NOF) proposing to deny certification on October 21, 1994 (AF 115). The CO stated that the Employer's wage offer of $3,725.00 per month did not meet the prevailing wage of $4,975.00 per month for the position as determined by the State Employment Office (EDD), and that the Employer had failed to provide documentation to support its wage offer.

The Employer responded on November 8, 1993, with a letter and a wage survey prepared by Appleone Employment Services based on an accumulation of statistical data from databases of Dun & Bradstreet and Appleone. The databases consisted of 2,625 responses to questionnaires from throughout the State of California. The survey contained monthly wage data for middle managers in nine job titles in 11 specific types of business and "other" businesses. The survey did not list wages paid to import/export managers (AF 122-138).

The CO issued a Supplemental NOF stating that the Appleone survey is not appropriate and does not rebut EED's prevailing wage determination because it does not directly address the wages paid to import/export managers. The CO requested that the Employer do a wage survey of six or more employers, both larger and smaller, who are located in the same geographical area and who employ import/export managers. The Employer was instructed by the CO to increase its wage offer to the prevailing wage and retest the labor market or establish that its wage offer is within 5% of or exceeds the prevailing wage for the occupation (AF 116-119).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The Employer, by Counsel, submitted rebuttal dated November 22, 1994 (AF 102-108). The Employer referred to the 1992-93 edition of the Occupational Outlook Handbook published by the U.S. Department of Labor, stating that no specific category exists for import/export managers, and that the duties of the position are related to those of purchasing agents, managers, wholesale and retail buyers, and merchandise managers. Therefore, the Employer contended that the salary for an import/export manager should be more or less the same as salaries for the aforementioned related jobs.

The CO did not agree with the Employer's rebuttal contentions and issued a Final Determination denying certification on December 1, 1994 (AF 98-101). The CO determined that the Employer had not shown any direct comparison with salaries paid to import/export managers in the same labor market and that the methods used by the Employer did not refute EDD's prevailing wage determination.

The Employer requested review of the CO's Final Determination by letter dated December 27, 1994 (AF 1-97). Employer's Counsel submitted a Statement of Position on August 3, 1995.

Discussion

The issue is whether the Employer's job offer is at the prevailing wage for the occupation.

Under § 656.20(c)(2) of Title 20 of the Code of Federal Regulations, an employer is required to offer a wage that equals or exceeds the prevailing wage determined under § 20 C.F.R. § 656.40, which directs that the prevailing wage be determined under the Davis-Bacon Act or The Service Contract Act when occupations are subject to those acts or determined by the average wage paid to workers similarly employed in the area of intended employment when an occupation is not subject to the aforementioned acts.

This Board has held that when an employer is notified that its wage offer is below the prevailing wage, but fails to either raise the offer to the prevailing wage or justify the lower wage it is offering, certification is properly denied. *Abelardo Chaidez*, 93-INA-256 (Apr. 28, 1994); *Dr. and Mrs. Dean Berkus*, 93-INA-301 (July 18, 1994); *Editions Erebouni*, 90-INA-283 (Dec. 20, 1991). The Employer bears the burden of establishing that the CO's prevailing wage determination is incorrect and that the Employer's wage offer is at or above the correct prevailing wage for the job offered. *PPX Enterprises, Inc.*, 88-INA-25 (May 31, 1989) (*en banc*).

The Employer challenged the CO's prevailing wage determination with a survey of monthly wages paid to middle management employees in nine different job titles, none of which included import/export managers. The survey covered all of California and was not limited to the area of intended employment (AF 135-138). The Employer also placed reliance on salaries paid for jobs listed in the Occupational Outlook Handbook. However, again, none of these jobs were import/export manager positions. The Employer's argument that the positions surveyed are similar to the offered job and therefore applicable in determining the prevailing wage for the offered job has not been established by any creditable evidence.

The Employer was requested by the CO in the Supplemental NOF to conduct a wage survey of six companies that employ import/export managers in the area of intended employment and to report the results of that survey to the CO. The Employer did not provide the requested survey. We don't know if the Employer conducted the survey and found the results adverse to its position or did not conduct the survey. We do know that such a wage survey would have provided direct evidence of wages paid to import/export managers in the area of intended employment and may have been persuasive evidence of the prevailing wage for the offered job.

We find that the arguments and survey presented by the Employer are not persuasive and failed to rebut the CO's prevailing wage determination. Accordingly, certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.